SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-4621

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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The Petitioner, Glenn W. Bricker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire entered in case No. 6156a.

OPINION BELOW

The opinion of the Supreme Court of New Hampshire, not yet reported, appears in Appendix A hereto. The opinion of the court of first instance, the Superior Court of New Hampshire, appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on July 29, 1971, Appendix A below. 1/ A timely motion for rehearing was denied on August 31, 1971,

1/ Under New Hampshire practice the opinion of the Supreme Court ending in the notations "Exceptions overruled; Petition Dismissed" along with the denial of the motion for rehearing, constitutes the judgment.

and timely motions to remand to the Superior Court for the taking of further testimony, filed on June 1, 1971, and August 9, 1971, were respectively denied on July 20 and August 31, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Is a state chartered private charitable hospital corporation, operating as the only hospital in the community or within a 25 mile radius, so linked with the state by being financed, in part, by local government contributions, Hill-Burton construction funds and Medicare, that the Fourteenth Amendment imposes due process limitations on its removal of the tenure status of physicians who are members of its staff?

2. Is the tenured staff physician of such a hospital denied due process when the hospital refuses to give him notice of charges against him either before or during the hearing on which the removal action will be based?

3. Is the physician denied due process when the hearing body receives and considers, on the question of his fitness to retain tenure, evidence of the fact that he testifies for plaintiffs in medical malpractice actions?

4. Is the physician denied due process when the substance and findings of such hearing are reported only orally to the separate body which determines his tenure and when that body then ends his tenure without a statement of reasons therefor?

5. Is the physician denied due process when, in seeking injunction in the state courts against the hospital's ending of his tenure, the courts accept as evidence on the merits of the case testimony as to specific acts of his alleged misconduct which were unmentioned in the hospital's proceedings and were not specially pleaded in court by the hospital?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a physician, qualified for membership on the "active staff" of the respondent, a privately incorporated charitable hospital and the only hospital within a radius of about twenty-five miles. Appointments to the active staff are made annually. In October, 1970, after petitioner had been a member for several years, he was denied reappointment. In this litigation he complains against respondent's proceedings which led to this denial.

Under the Hill-Burton Act (60 Stat. 1041 (1946) as amended, 42 U.S.C. 291 et seq.) respondent has received substantial federal aid in the construction and expansion of its building. It also receives funds voted by nearby local governments under state enabling legislation, New Hampshire Revised Statutes Annotated 31:4-VI.

Although active staff members' appointments are only for a year at a time, respondent's bylaws give important tenure protection. The appointing body, the lay Board of Directors, may fail to reappoint a member only on recommendation of both the active staff itself and the staff credentials committee, (a distinct body whose membership, by by-law, is identical with the active staff). In 1970, the staff and committee each consisted of ten members, including petitioner. Further, a physician receiving an unfavorable recommendation from staff and committee is entitled to a hearing before the joint conference committee of the directors and staff; the latter committee must report to the directors before the reappointment can be denied.

In August, 1970 the active staff voted against petitioner's reappointment. The credentials committee took the same action a few days later at a meeting of which petitioner, a member, received no notice. However, respondent notified petitioner that his non-reappointment had been recommended, and advised him of his hearing rights before the joint conference committee.

Petitioner requested the hearing, which was then duly scheduled, and he also requested an advance specification of the charges against him. The latter request was refused and no statement of complaints against his conduct or qualifications was given him by respondent either before or at the hearing, although individual members of the directors and staff made complaints against him at the hearing itself. No reason was then given for refusing the specification of charges but respondent's lay president later testified (Exhibit 10, pages 47-48:)

"Dr. Bricker, in a phone conversation, at least, asked me

what the particular charges were, which I construed to be asking, in a sense, of giving him a list against, for which he could erect a defense, I guess you might say, and this certainly was not my idea of how the meeting should be conducted. He was, in general, aware of the situation that was becoming, what we call was untenable there, and his disruptive influence among the other doctors, and to give him a bill of particulars or try to conduct this in any legal court fashion was not our intention. It was simply to get at the basic elements of the matter and the dissension between the other doctors and himself and whether or not he was, in general, good for the hospital or bad for the hospital. It was not intended to be conducted by any rules that are generally applicable to the courtroom rules."

The hearing on October 14, 1970, lasted several hours and consisted mostly of petitioner's attempts first to learn the specifics of the complaints against him and then refute, on the spot, those that were stated.

Complaints presented against petitioner at the hearing, as well as later testimony presented by the respondent in the present litigation, included objections to his practice of testifying for plaintiffs in medical malpractice actions.

Following the joint conference committee hearing, the committee voted not to renew petitioner's appointment, but did not specify reasons. The president and vice president of respondent, both of whom were members of the committee, reported orally to the board of directors on the reasons for the recommendation (Exhibit 5-B). The board voted to end petitioner's appointment, and the president notified him of this by letter on October 20, 1970, again without specification of reasons (Exhibit 4-G.)

Petitioner immediately sought temporary and permanent injunctions against respondent in the Superior Court, alleging that he had been denied "due process of law" in respondent's proceedings. The court issued a temporary injunction on December 1, 1970 (see Reserved Case).

Upon hearing on the merits of the petition for permanent injunction the Superior Court dismissed the petition. Over timely objection by the petitioner, the court had considered evidence of complaints against petitioner which had neither been presented at the joint conference committee hearing, nor specially pleaded by respondent, nor otherwise formally presented to him.

Under New Hampshire practice, petitioner's exceptions were reserved to the New Hampshire Supreme Court (see Reserved Case) which overruled them.

While agreeing that no specification of charges was given petitioner at any time after non-reappointment proceedings began in August 1970, the Superior Court found that "his objectionable actions were adequately made known to him by formal and informal discussions with him for a long period prior to the October 14, 1970 hearing. (Appendix B.) The Supreme Court of New Hampshire described this notice as "by formal notifications and informal discussions", (Appendix A.) but the petitioner submits that to the extent that the record permits any finding of such notice, it does not meet Fourteenth Amendment standards. The only earlier formal notices to petitioner of any significance were:

(1) A letter threatening to end his appointment if an incident similar to a clash between him and the chief nurse in the spring of 1970 should again occur (the record shows that the directors had tried and con-

victed the petitioner of fault in this incident, in absentia and without notice; no recurrence of such an incident prior to the non-reappointment proceedings is alleged);

(2) A formal warning early in 1970 regarding his arrearages in keeping records of his patients' cases;(no arrearage was claimed to exist at the time of his non-reappointment);and

(3) A letter sent to petitioner six years earlier (July 14, 1964), conditioning his continued staff status on his harmonious working with the respondent's personnel and staff. (Two years later respondent advanced petitioner to active staff from the less privileged "courtesy staff".)

Aside from these remote formal notices, respondent has shown no more than that various staff members and personnel have, at unspecified times, made various complaints to petitioner about his conduct, orally or in some other informal manner.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner, a physician, after being refused in repeated attempts to engage counsel for what the Superior Court recognized to be an unpopular cause (Exhibit 7, pages 157 and 159), originally appeared pro se, preparing and presenting his own "Petition for Injunction" and "Motion to Amend Petition for Injunction" (see Reserved Case). He claimednot only specific violations by respondent of its by-laws (paragraphs 11, 19 and 21), but also violations of his rights to "due process of law" (paragraphs 22 and 25) for the several reasons set forth in other paragraphs.

The Supreme Court of New Hampshire has on several occasions construed the words "due process" or "due process of law" as implying and carrying the sense in which they are used in the Fourteenth Amendment. See Corning Glass Works v.

Max Dichter Co. 102 N.H. 505, 509, 161 A.2d 569 (1960); Opinion of the Justices, 66 N.H. 629, 633, 33 A.1076 (1891); and In re Mundy 97 N.H. 239, 241 (and dissenting opinion at page 247), 85 A.2d 371 (1952). Although the New Hampshire Constitution has no "due process" clause using those words, its phrase "law of the land" (Constitution of 1783 as amended, Part I, art. 15th) has been construed in the cited decisions to carry the same effect as the Fourteenth Amendment's due process clause.

After petitioner had engaged counsel and before hearing on the merits, a further "Motion to Amend Petition for Injunction" was filed (Reserved Case), alleging respondent's receipt of public funds, both federal and local, to emphasize that State action under the Fourteenth Amendment was involved.

In its opinion with decree (Appendix B), the Superior Court recognized that petitioner particularly claimed a denial of "due process in not being given a statement of the charges to be made against him", and rejected this claim in its dismissal of his petition. Requests for rulings of law substantially covering the due process claim were denied by the court; see Reserved Case, Plaintiff's Requests for Findings of Fact and Rulings of Law, page 3 and 4, requests Nos. 2 (b), 8 and 10, and ruling thereon in Appendix B.

The Supreme Court of New Hampshire also expressly entertained petitioner's due process claim (Appendix A page 17) based on respondent's refusal to specify charges to him, and rejected the claim.

Finally, the Fourteenth Amendment basis of petitioner's claims was renewed in his "Motion for Rehearing" to the Supreme Court of New Hampshire (see certified record from that court) and its assertion by petitioner throughout the

litigation was expressly acknowledged on Page 3 of respondent's "Answer to Plaintiff's Motion for Rehearing" (certified record of the New Hampshire Supreme Court).

REASONS FOR GRANTING THE WRIT

I THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS WITHOUT NOTICE OF CHARGES, IN CONFLICT WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

Fourteenth Amendment protections apply to staff appointment and removal procedures at state chartered private hospitals like the respondent which receive substantial federal construction assistance under the Hill-Burton Act and operating and capital gifts from local government bodies. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A., 4th Circuit, (1963), cert. den. 376 U.S. 938; Eaton v. Grubbs, 329 F.2d 710 (C.A., 4th Circuit, 1964); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648 (C.A. 4th Circuit, 1967); Sams v. Ohio Valley General Hosp. Ass'n., 413 F.2d 826 (C.A., 4th Circuit, 1969); Foster v. Mobile County Hospital Board, 398 F.2d 227 (C.A. 5th Circuit, 1968), 37 ALR 3d 637. Each of these cases, it should be noted, involves the equal protection clause rather than the due process clause of the Fourteenth Amendment.

Due process in an administrative hearing implies the right to notice, and the right to notice implies a statement of charges in sufficient detail and sufficiently in advance of hearing to permit the preparation of a defense. While there is no simple formula

to determine in advance the adequacy of notice under the due process clause in all situations, its adequacy must be judged, at least in part, against the relative difficulty or ease to the party giving notice of providing a full and adequate statement of the essentials of the matter to be considered, and the relative importance or unimportance of the matter to the party receiving the notice. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Goldberg v. Kelley, 397 U.S. 254 (1970); Drown v. Portsmouth School District, 435 F.2d 1182 (C.A., 1st Circuit, 1970).

The petitioner submits that he, no less than the welfare recipients in the Goldberg case, is entitled under the Fourteenth Amendment to "timely and adequate notice detailing the reasons for a proposed termination" (397 U.S. 267 - 268). See also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (C.A., 5th Circuit, 1971) on the applicability of the due process clause to medical staff appointments.

It is further submitted that the conduct of both the respondent, in basing its action on charges of which petitioner had no notice before the hearing, and the New Hampshire courts in affirming the respondent's action after accepting proof of additional charges which were not specially pleaded, further violate petitioner's Fourteenth Amendment due process rights as established by this court in Re Ruffalo 390 U.S. 544 (1968).

In summary, petitioner's staff status with respondent, as a hospital substantially aided by federal and local governments, is well within the scope of Fourteenth Amendment protections against state action under the principle followed in the Simkins case (supra) and other cases cited from the Courts of Appeals in the Fourth and Fifth Circuits. The Supreme Court of New Hampshire has here, in a situation within the scope of Fourteenth

Amendment limitations, decided a substantial question of due process against the party claiming the protection of that right and against the due process principles set forth by this Court in Re Ruffalo and Goldberg (supra). The national scope of the Hill-Burton Act and the thousands of physicians and hospitals presently involved in staff membership relationships such as that which petitioner claims for himself here are factors to suggest that the discrepancy in the application of these principles between the Supreme Court of New Hampshire and the courts in the federal jurisdiction might now appropriately be corrected.

II THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS FOLLOWING HEARING AT WHICH EVIDENCE OF PETITIONER'S TESTIMONY IN MEDICAL MALPRACTICE CASES PER SE WAS ACCEPTED AS A SUBSTANTIAL CHARGE AGAINST HIM.

Question 3 presented here (page 2 above) is an important although subsidiary matter. It is submitted that for the respondent and the Superior Court to have accepted as valid complaints against petitioner's tenure the fact that he testifies as an expert witness for plaintiffs in medical malpractice actions, and to have justified their decisions against petitioner, in part, on the basis of that activity (with no showing that the testimony he gives is in any way improper per se), violates petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment and his rights of free speech under the First Amendment, not to mention the fact that it raises serious questions in regard to the administration

of the courts. Particularly, for the respondent and the courts to discriminate against the petitioner as a medical expert witness would appear to constitute an unjustifiable classification of him. See Sams v. Ohio Valley General Hosp. Ass'n. (supra).

III PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED BY THE DIVISION BETWEEN RESPONDENT'S HEARING AND DECIDING BODIES.

Question 4 (page 2 above) presents several further subsidiary due process matters. Since respondent kept no record of the proceedings and discussion at the joint conference committee hearing of October 14, 1970, and only an oral report was made to the deciding body, the board of directors, and since the board then ended petitioner's tenure without a statement of reasons, his Fourteenth Amendment rights have been violated. Morgan v. United States, 298 U.S. 468 (1936). Drown v. Portsmouth School District (page 10, supra).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully Submitted,

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September 29, 1971

APPENDIX A.

Grafton, No. 6156-a. Opinion of Supreme Court of New Hampshire

GLENN W. BRICKER, M.D.

v.

SCEVA SPEARE MEMORIAL HOSPITAL

Decided July 29, 1971

Snierson, Chandler & Copithorne (Mr. John P. Chandler orally) for the plaintiff and the town of Ashland, amicus curiae.

Wescott, Millham & Dyer (Mr. Peter V. Millham orally) for the defendant.

PER CURIAM. This is a bill in equity brought by a physician to enjoin a hospital from enforcing its decision not to reappoint him to the hospital's medical staff. Originally the petition was brought pro se by the plaintiff and a temporary injunction on the pleadings was denied by King, J. This order was sustained by this court on October 26, 1970. Bricker v. Sceva Speare Hosp., 110 N.H. 412, 270 A. 2d 358. On December 1, 1970, King, J., after an evidentiary hearing, issued a temporary injunction ordering the defendant to permit plaintiff the customary access of a medical staff member to the facilities of the hospital. Present counsel for the plaintiff entered the case originally for the town of Ashland, as amicus curiae and appeared for the plaintiff midway through the temporary injunction hearing.

On May 17, 1971, the Trial Court (Johnson, J.), after hearing, dismissed the petition of the plaintiff but stayed the discharge of the temporary injunction pending an appeal to this court. The plaintiff's exceptions were reserved and transferred by the trial court. The record includes the transcript of the hearing on the temporary injunction which was admitted in evidence at the trial on the merits.

Dr. Bricker came to Ashland from Pennsylvania in early 1963, and is the only physician practicing there. The Sceva Speare Memorial Hospital is located in Plymouth about six miles from Ashland. The next nearest hospitals to Ashland are in Franklin and Laconia, both about twenty-five miles away. The Sceva Speare Hospital serves an area population of about twelve thousand. At the time this action was brought there were ten physicians on the active medical staff, including Dr. Bricker. All of the active medical staff, with the exception of Dr. Bricker and a pathologist from Laconia, were residents of Plymouth.

The defendant hospital is organized as a charitable corporation with a president and the usual officers including a board of directors of not less than eighteen nor more than twenty-four. In addition to certain special classifications such as consulting staff not germane to this case the medical by-laws provide for two classes of physicians entitled to hospital privileges. These are courtesy medical staff and active medical staff. Courtesy medical staff members are physicians eligible for active staff membership by qualification but either first year members of the staff or otherwise ineligible for appointment to the active medical staff. Courtesy members are eligible for appointment to the active staff after one year. The bylaws provide that staff appointments shall be made by the board of directors for terms of one year on recommendation of the active medical staff prior to June 30th of each year. The credentials committee is made up of the active medical staff and charged with the duty of recommending the privileges to be extended to individual staff members and reviewing all staff appointments annually. Surgical privileges vary with individual physicians but no physician may treat a patient in the defendant hospital who is not a staff member.

Dr. Bricker was appointed to the courtesy staff on February 4, 1963 and to the active staff in June of 1966. He was reappointed in 1967, 1968 and 1969. The annual meeting of the medical staff in1970 was not held until August 21, 1970. Dr. Bricker received a notice of this meeting but was hospitalized in the Laconia Hospital due to an accident and unable to attend the meeting. The remainder of the active staff present at the August 21st meeting voted to recommend reappointment of all the active staff except Dr. Bricker. This recommendation was adopted by the board of directors at their meeting on August 24, 1970, together with a direction that Dr. Bricker be notified of the action and his right of appeal under the bylaws.

The medical bylaws provide that where reappointment is not recommended, the physician concerned shall be given "an opportunity of appearing before the Credentials Committee and Joint Conference Committee in joint session." Dr. Bricker requested a hearing and appeared before the credentials committee and the joint conference committee on October 14, 1970.

The joint conference committee consists of the president and vice-president of both the medical staff and the board of directors together with the administrator as an ex officio member. The meeting of October 14th appears to have been attended by all persons entitled to, including Dr. Bricker. During the meeting, which lasted some three and one-half hours, Dr. Bricker questioned each member of the active medical staff individually and learned that they were unanimous in opposing his reappointment. Some members of the staff gave their reasons for opposing him and others refused. The president of the hospital notified Dr. Bricker by letter dated October 20, 1970 that the board of directors had again voted

unanimously not to reappoint him to the medical staff and the present action followed.

The initial question is the extent that the exclusion of a physician from staff privileges in a hospital is subject to review by the courts. Generally courts have drawn a distinction in such cases between public and private hospitals. See Annot., 37 A.L.R. 3d 645 (1971); The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, Wash. U.L. Q. 485 (1966). In the present case the acceptance of federal and town funds in addition to private contributions and income from patient care has not changed the private character of the defendant hospital. Woodward v. Porter Hosp., Inc., 125 Vt. 419, 217 A. 2d 37 (1966); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S. E. 2d 533 (1962); Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (1963).

In the case of private hospitals some courts have applied the same limitations generally applicable to actions against private societies (see Bricker v. New Hampshire Medical Society, 110 N.H. 469, 470, 272 A. 2d 614, 616 (1970))and held that the exclusion of a physician from staff privileges rests within the discretion of the hospital authorities and is not subject to review by the courts. Levin v. Sinai Hospital, 186 Md. 174, 46 A. 2d 298 (1946); Annot., 37 A.L.R. 3d 645, 659, § 3 (1971). More recently courts have recognized that the public has a substantial interest in the operation of private hospitals and that of necessity in the public interest some measure of control by the courts is called for. This has led to a rule that exclusion from staff privileges must be done in accordance with the bylaws of the hospital (Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A. 2d 456 (1959); Joseph v Passaic Hosp. Ass'n, 26 N.J. 557, 141 A. 2d 18 (1958))and will be reviewed by the courts and

set aside if arbitrary, capricious or unreasonable. Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A. 2d 817 (1963); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio Ct. App. 2d 246, 250 N.E. 2d 892 (1969); Woodward v. Porter Hosp., Inc. supra; Annot., 37 A.L.R. 3d 645, 661 s. 3(b).

The hearing accorded Dr. Bricker was found by the trial court to be substantially in accordance with the bylaws and gave him an opportunity to question the credentials committee and state his reasons why he should be reappointed. The plaintiff argues that he was denied due process by this procedure since he was not given a statement of the charges against him prior to the hearing. The trial court found that Dr. Bricker's objectionable actions were adequately made known to him by formal notifications and informal discussions for a long period prior to the hearing and these actions were adequately reviewed at this meeting. The evidence supported this finding and that the hearing accorded the plaintiff a fair opportunity to urge reconsideration of the board's action. "All that is required is for the board to be fully informed so that it may make an intelligent and reasonable judgment in good faith. . . . "Sussman v. Overlook Hosp. Ass'n, 95 N.J. Super. 418, 425, 231 A. 2d 389, 393 (1967).

The plaintiff urges that it was error for the trial court not to limit the evidence introduced before it to matters presented to the joint conference committee and the credentials committee. The issue before the court was similar to that in zoning appeals where the court is concerned with whether the action of a zoning board of adjustment was "unjust and unreasonable." It has been held the court may properly in those cases consider additional evidence not presented to the board to assist it in evaluating the action of the board (Sweeney v. Dover, 108 N.H. 307, 234 A. 2d 521 (1967);

Vannah v. Bedford, 111 N.H. , 276 A. 2d 253 (1971)) and the same is the rule in this case.

It is clear from the testimony and the findings of fact made by both King, J. after hearing on the preliminary injunction and Johnson, J. in the dismissal of the action that objections to the professional competency of the plaintiff were not a major factor in his nonreappointment. In his findings of fact, Johnson, J. states the reasons as follows: "The Court finds as a fact that Dr. Bricker has been a disruptive force at the Sceva Speare Memorial Hospital; that he has acted in a way detrimental to the best interests of the institution; that he has acted in a way which is detrimental to the good practice of medicine by other members of the Medical Staff of the Hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the Hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the Medical Staff and the Directors of the Hospital; and that his actions have had, in general, an adverse effect upon the smooth-working relationships so necessary for adequate and essential health care. Finally, the Court finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worst as highly unprofessional . . ."

The evidence which was extensive and included testimony by four members of the medical staff, the lay president and vice-president of the board and the administrator supports these findings. On the basis of these findings the trial court found that the action of the defendant in not reappointing Dr. Bricker was neither arbitrary nor capricious and was reasonable under all the circumstances.

The denial of hospital privileges to the plaintiff under the circumstances of this case seriously affects the ability of the plaintiff to practice medicine in the town of Ashland. The town of Ashland is deprived of effective medical service by the failure of the board to reappoint the plaintiff. The board on the other hand had a primary duty to maintain the hospital for service to all the public in its area including the town of Ashland. Where as in this case the staff is small a disruptive member is more destructive of efficiency than in the case of a large staff where doctors work less frequently together and on a less personal basis. The other physicians on the staff were unanimous in their testimony that his presence on the staff was disruptive of the hospital and the medical staff. The court found that the plaintiff was an active disruptive force on the hospital operation. Weighing the respective interests the court thus concluded that the board was justified in refusing to reappoint the plaintiff to protect and preserve the hospital. See Glass v. Doctors Hosp., Inc., 213 Md. 44, 131 A. 2d 254 (1957); Hagan v. Osteopathic Gen. Hosp., 102 R.I. 717, 232 A. 2d 596 (1967).

The evidence supports the trial court's finding that defendant's actions were not arbitrary, capricious or unreasonable and the decree dismissing the action is sustained.

The motion to remand for the taking of further testimony is denied. The additional affidavits filed in this court are merely cumulative to other affidavits already considered by the trial court in denying plaintiff's motion for a new trial.

Exceptions overruled; petition dismissed.

APPENDIX B.

Opinion of the Superior Court of New Hampshire

Grafton
Equity No. 11,397

GLENN W. BRICKER, M.D.

v.

SCEVA SPEARE MEMORIAL HOSPITAL

DECREE

This is a petition brought on behalf of Dr. Glenn W. Bricker to enjoin the Board of Directors of the Sceva Speare Memorial Hospital of Plymouth, New Hampshire, from removing him as a member of the Medical Staff of said Hospital.

On August 21, 1970, the Medical Staff and Credentials Committee (they being one and the same) of the Hospital met and voted to not recommend the reappointment of Dr. Bricker. Dr. Bricker was given notice of this meeting in the usual fashion, that being a post card from a member of the Hospital staff, but he was unable to attend because he was personally ill and was a patient at the Lakes Region General Hospital. On August 24, 1970, the Credentials Committee again met and voted unanimously to not recommend the reappointment of Dr. Bricker to the Board of Directors of the Sceva Speare Memorial Hospital. On August 25, 1970, Dr. Bricker was informed of this action and his right of appeal by Mr. Beaulieu, Hospital Administrator.

Dr. Bricker met with the Joint Conference Committee and Credentials Committee on October 14, 1970, and the charges against him were discussed. He had not received written specifications before this meeting as he had re-

quested, but in view of all of the circumstances, the Court finds that he was given a fair appeal procedure.

The Board of Directors of the Hospital met on October 19, 1970, and accepted the recommendation of the Joint Conference Committee that Dr. Bricker not be reappointed as a member of the Medical Staff. On October 20, 1970, Mr. Wadleigh, Hospital President, wrote Dr. Bricker informing him of this action.

Dr. Bricker later brought this action to enjoin the Board from dismissing him in which he claims, essentially, that:

(1) The published procedures of the Hospital were not followed in dismissing him; and that, in particular, he was denied due process in not being given a statement of the charges to be made against him prior to the action of the Medical Staff, Credentials Committee and the Board of Directors.

(2) That the action of the Medical Staff, Credentials Committee and the Board of Directors of the Sceva Speare Memorial Hospital is arbitrary, capricious and unreasonable.

Dr. Bricker first appeared pro se before Justice John W. King asking for an ex parte order to reinstate him at the Hospital. This request was denied. Dr. Bricker then brought an appeal to the Supreme Court which returned the case to the Grafton County Superior Court for hearing on the temporary injunction. By this time the September Term of the Grafton County Superior Court had ended and Justice King was holding Court in Coos County. The hearing was therefore held in the City of Berlin.

After a two-day hearing before Justice King, the transcript of which has been entered as evidence in the within

trial, Justice King ordered Dr. Bricker reinstated at the Hospital pending the hearing on his prayer for a permanent injunction. This present hearing was held on Tuesday and Wednesday, the 4th and 5th of May of this year.

The Court finds as fact that Dr. Bricker has been a disruptive force at the Sceva Speare Memorial Hospital; that he has acted in a way detrimental to the best interests of the institution; that he has acted in a way which is detrimental to the good practice of medicine by other members of the Medical Staff of the Hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the Hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the Medical Staff and the Directors of the Hospital; and that his actions have had, in general, an adverse effect upon the smooth-working relationships so necessary for adequate and essential health care. Finally, the Court finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worst as highly unprofessional (the Court specifically finds that the allegations contained in the testimony of witnesses Jordan, Morse and Southerland are truthful).

The Court finds that there has been substantial compliance with the rules, regulations and bylaws of the defendant Hospital and that the procedure by which Dr. Bricker was not reappointed, while it may not have been in absolute conformity to the letter of the rules, regulations and bylaws, was adequate in view of all of the circumstances.

The Court finds that there was no requirement under the bylaws, or under general common law, that Dr. Bricker be given a written specification of the charges to be made against him prior to the vote on his reappointment. The Court finds

that Dr. Bricker had ample opportunity at the October 14th meeting to defend himself against the charges made against him.

The Court finds that the action of the Medical Staff and Credentials Committee of the Sceva Speare Memorial Hospital and the Board of Directors of the Hospital in not reappointing Dr. Bricker was neither arbitrary nor capricious and was reasonable under all of the circumstances. The Medical Staff and the Board of Directors of the Hospital have a duty to the citizenry of the Plymouth area to operate the Sceva Speare Memorial Hospital in an efficient and workable manner. The Court finds that they have attempted to exercise this duty to the public and that their actions in the case of Dr. Bricker are reasonable under all of the circumstances in this case.

The petition of Dr. Bricker is therefore dismissed.

This order of the Court is stayed until a hearing may be held before the Supreme Court of the State of New Hampshire to determine the legal issues involved. However, the parties are ordered to begin at once to prepare for such a hearing before the Supreme Court so that a hearing may be held during the June session of the Supreme Court.

It is further ordered that a transcript of this recent hearing be made available to the parties on or before May 22, 1971, assuming the petitioner requests an appeal upon receipt of this decree. It is further ordered that the reserved case and other documents which ordinarily would be printed may be photocopied for forwarding to the Supreme Court. The Court need not remind counsel that the requirements for appeals before the Supreme Court can and should be waived so that the case may be heard during the June session of the Supreme Court.

The Court believes that it is of the utmost importance that this matter be finally resolved at the earliest possible time by a hearing before the Supreme Court; thus the stay of this order has been granted without motion.

RULINGS ON REQUESTS

For the Plaintiff; Findings of Fact:

Granted: 1; 2; 4; 5; 6; 8; 11; 12

Denied: 13

As to Request 3, plaintiff received notice of the meeting but the fact that his reappointment would be considered was not specifically made known to him.

As to Request 7, Dr. Bricker's qualifications were a matter of frequent informal discussion of the Medical Staff and he was made well aware that many of his activities were considered disruptive prior to the August meetings. In short, the matter had been adequately discussed by the Medical Staff and Credentials Committee prior to the August meetings and no lengthy formal discussion was necessary at the August meetings. There was, of course, a discussion on October 14, 1970, with Dr. Bricker in attendance.

As to Request 9, the Court finds that the person receiving Dr. Bricker's requests for specification of charges consciously and positively made the decision to not honor his request; but the Court finds that this decision was not made with the intent to deprive Dr. Bricker of a fair hearing on October 14, 1970.

As to Request 10, if "formal" is defined as written specifications, Dr. Bricker did not receive them. But the

October 14, 1970, meeting lasted from approximately 7:30 p.m. to 11:15 p.m., and the Court finds that this permitted Dr. Bricker ample opportunity to explain his actions which were the cause of his non-reappointment. In addition, his objectionable actions were adequately made known to him by formal and informal discussions with him for a long period prior to this meeting, and these actions were adequately reviewed at this meeting.

For the Plaintiff: Rulings of Law

Granted: 1; 6; 9

Denied: 2; 3; 4; 7; 8

As to Request 5, the Medical Staff and Credentials Committee are one and the same. The Medical Staff and Credentials Committee exercised substantial compliance with the bylaws.

As to Request 10, the defects, if any, of the August meetings were cured by the October 14 meeting, for which he was given due notice. The Court finds that there is no need for specific written charges being presented prior to such a meeting and that, as a practical matter, Dr. Bricker was to a material extent aware of his conduct at the Hospital which his colleagues found objectionable prior to the October 14, 1970 meeting, even though these complaints had not been reduced to the formality of a formal statement of charges.

For the Defendant; Findings of Fact:

Granted: 1; 2; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14; 15; 16; 17; 18; 21; 22; 23; 24; 25

Denied: None

As to requests 19 and 20, the Court finds that it is not unprofessional, as such, to testify in malpractice cases. However, the Court finds that his activities as a Deputy Sheriff, and his involvements therein, did adversely affect his relationship with the Hospital.

For the Defendant; Rulings of Law:

Granted: A; C; D

Denied: None

Request B states the law, subject to the statements contained in Request C.

William R. Johnson
Presiding Justice

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71—462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

RESPONDENT'S OBJECTION TO CONSIDERATION OF BRIEFS FILED BY AMICI CURIAE

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Laconia, New Hampshire 03246
Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

GLENN W. BRICKER,
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Respondent

RESPONDENT'S OBJECTION TO CONSIDERATION OF BRIEFS FILED BY AMICI CURIAE

In this case two Briefs have been filed by entities, each claiming it is appearing or seeking to appear as Amicus Curiae. Each Brief is extremely partisan in favor of Dr. Bricker. Your Respondent feels that these Briefs are misleading in that they are not the usual Amici Curiae Briefs, but are the product of a great deal more involvement by Petitioner than would ordinarily be expected.

With respect to the Amici Curiae Briefs it has come to Counsel's attention that both the Town of Ashland Brief and the American College of Legal Medicine Brief were brought to a Laconia, New Hampshire printer by Dr. Bricker, and the printing was paid for by checks drawn on Dr. Bricker's account. The Selectmen of the Town of Ashland were approached by Dr. Bricker or some third person and told that if they would allow a Brief to be filed in the name of the Town there would be no cost to the Town, and they authorized its filing with that condition by the letter attached hereto. The rough draft of this letter was given to the Selectmen by Dr. Bricker.

The Brief of the American College of Legal Medicine was hand carried to my office on November 8, 1971; it was not mailed from Florida. Dr. Bricker is a founder and member of the American College of Legal Medicine and its Brief was filed at his request. The Motion of the American College of Legal Medicine alleges that the consent of Respondent was requested but refused. The only request ever made was by a telephone call from Dr. Bricker to Counsel for Respondent on the night of November 4th. Dr. Bricker's high degree of involvement reveals that this is not the ordinary Amicus Curiae situation.

The facts indicate that the Brief of the Town of Ashland is not the type of Brief that should be granted an exception under Rule 42:4. Further, neither the Brief of the Town of Ashland or the Brief of the American College of Legal Medicine raises any questions of law which are not raised and discussed adequately in those Briefs already filed in Dr. Bricker's name.

Under these circumstances the Respondent prays that the Court deny the Motion of the American College of Legal Medicine for leave to file the Brief, and that the Court not consider the Brief of the Town of Ashland because it does not fall within the spirit of the exception created by Paragraph 4 of Rule 42.

Respectfully submitted,

PETER V. MILLHAM

101 Court Street
Laconia, New Hampshire
03246

November 12, 1971